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November 3, 2021

**VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
NO. 7020 2450 0001 6265 0134**

M. Joseph Clement, Esquire  
Wisler Pearlstine, LLP  
460 Norristown Road, Suite 110  
Blue Bell, PA 19422

**Re: Heather & Patrick Duffy  
Opinion, Decision and Order  
Lower Providence Township Zoning Hearing Board Application #Z-21-20**

Dear Mr. Clement:

In accordance with the initial application filed on September 3, 2021, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board.

Yours very truly,



Keith B. McLennan

KBM/  
Enclosure

Pc: George Ozorowski, Esq. Chairman  
Joseph Pucci Vice-Chairman  
Kathie A. Eskie  
Gail Hager  
Tina Blain

Patricia Alzamora  
Christopher Gerdes  
Randy Klein  
Michael Mrozinski

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO.	Z-21-20	:	HEARING DATE:	September 23, 2021
		:		
		:		
APPLICATION OF:		:		
	Heather and Patrick Duffy	:		
	100 Regency Drive	:		
	Audubon, PA 19403	:		
		:		
PROPERTY:		:		
	100 Regency Drive	:		
	Lower Providence Township	:		
	Audubon, PA 19403	:		
	Parcel No. 43-00-11474-00-3	:		

**OPINION, DECISION AND ORDER OF THE  
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

On September 3, 2021, applicants Heather and Patrick Duffy (“Applicants”) owners of 100 Regency Drive, Audubon, Pennsylvania filed an application requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) § 143-37.A(2) to permit construction of an in-law suite and garage addition to an existing single-family home with a side yard setback of fifteen feet (15’) where a minimum of twenty feet (20’) is required and a rear yard setback of thirty feet (30’) where a minimum of sixty feet (60’) is required in the R-2 Residential District. Applicants additionally request relief from § 143-170 to allow building permits to be requested after 18 months from the date of this Board’s decision due to supply shortages and associated increased costs. Applicants intend to construct a two-story detached garage with an office/in-law suite on the second floor.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on September 23, 2021. Present at the hearing were: George Ozorowski, Chairman, Kathie Eskie, Member, Gail Hager, Member, Patricia Alzamora, Member, Christopher Gerdes, Alternate, and Randy Klein, Alternate. Also

present were Keith B. McLennan, Esquire, the Solicitor, and Mike Mrozinski, the Community Development Director.

### **FINDINGS OF FACT**

1. The Applicants are Heather and Patrick Duffy (Applicants), owners of the lot and home located at 100 Regency Drive, Audubon, Pennsylvania which was acquired in 2007.
2. Applicants were represented by Mr. Joseph Clement.
3. Patrick Duffy testified in support of the application.
4. The subject property, 100 Regency Drive, Audubon, Pennsylvania is comprised of a 20,572 square foot parcel with tax parcel number 43-00-11474-00-3 with a single-family home and a shed (hereinafter the "Property").
5. The present use of the Property began in 1978.
6. The applicable zoning district is the R-2 Residential District.
7. The home is serviced by public sewer and water.
8. No previous zoning appeal has been filed in connection with this Property.
9. Appellant intends to construct a thirty-two foot (32') by thirty-six foot (36') two-story detached structure to serve as a garage on the first floor with an office/in-law suite on the second floor.
10. The Property currently abuts heavily wooded Township open space on three sides.
11. There is only one abutting Property that is not township owned. It is a single family detached home.
12. The street upon which the Property is located is a cul-de-sac with ten (10) single

family homes.

13. Applicants are currently both working from home.

14. Applicants' children partake in remote learning from home.

15. The children will soon be of driving age and Applicants require addition space for vehicles.

16. Applicant Heather Duffy anticipates assisting her elderly parents in the future.

17. The property is unusually configured with a diamond shape.

18. Because of the physical circumstances including the shape of the Property, the location on the cul-de-sac, and the proximity to open space, the Property cannot be developed in strict conformity with the provisions of the Ordinance.

19. The proposed location of the garage is the only pragmatic location for the construction to occur.

20. The neighborhood has homes with detached garages similar to the proposed use.

21. The proposed use will not alter the character of the neighborhood.

22. There are current supply chain issues causing limitations and delays in the ability to construct the garage.

23. There will be no impact on traffic patterns or volume due to the proposed use.

24. The proposal is compliant with all other zoning regulations.

25. There is no change of use requested.

26. There will be no impact on traffic patterns in the neighborhood by the proposed addition.

27. The proposed addition will not emit smoke, dust, odor or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants.

28. Applicants discussed the matter with the adjoining neighbors who had no objection to the relief requested.

29. There was no adverse public comment regarding this Application.

30. The following exhibits were included in the record of the hearing:

A – 1 The Application including the attachments.

B – 1 The Certificate of Posting.

B – 2 The Certificate of Notification.

B – 3 Letter Sent to Property Owners.

B – 4 Matrix of Addresses.

## **DISCUSSION**

### **I. Statement of the Case**

Applicants are requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) § 143-37.A(2) to permit construction of an in-law suite and garage addition to an existing single-family home with a side yard setback of fifteen feet (15’) where a minimum of twenty feet (20’) is required and a rear yard setback of thirty feet (30’) where a minimum of sixty feet (60’) is required in the R-2 Residential District. Applicants additionally request relief from § 143-170 to allow building permits to be requested after 18 months from the date of this Board’s decision due to supply shortages and associated increased costs.

### **II. Variance Legal Standard**

A. Dimensional v. Use Variance. There are 2 types of variances, a “dimensional”

variance and a “use” variance. Differing standards apply to use and dimensional variances. One who advances a dimensional variance seeks to adjust zoning regulations so that the property can be used in a manner consistent with the zoning regulations. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998). In contrast, a use variance seeks to use the property in a way that is inconsistent or outside of the zoning regulations. Tidd v. Lower Saucon Township Zoning Hearing Board, Green Gable Investment Partners, LP and Lower Saucon Township, 118 A. 3d 1 (Pa. Cmwlth. 2015). Regardless of whether the variance sought is a use or dimensional variance, the reasons for granting a variance must be substantial, serious, and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Cmwlth. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998). The Supreme Court in Hertzberg held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of the Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. at 263-64, 721 A.2d at 50. In this case the Board is asked to grant a dimensional variance.

B. The Five Part Variance Test. To obtain a variance the Applicant must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

(1) There are unique circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) Because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) Such unnecessary hardship has not been created by the applicant.

(4) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

See also: Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 88 A.3d 488, 520 (Pa. Cmwlth. 2014) appeal denied, 101 A.3d 788 (Pa. 2014) and appeal denied, 101 A.3d 788 (Pa. 2014); 53 P.S. § 10910.2.

C. Dimensional Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property close to useless if a variance is denied, and that the proposed use will not be contrary to public interest. However in the case of Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) our Supreme Court held that in the case of a dimensional variance, the quantum of proof required to establish unnecessary hardship is lesser than when a use variance is sought. *Id.* at 258-59. For example, the Hertzberg Court held that to justify the grant of a dimensional variance, “...courts *may* consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.” 721 A.2d at 50 (*italics supplied*). In effect, no longer is an applicant required to demonstrate in a dimensional variance case, that the property was close to useless without the variance.

Although Hertzberg eased the burden of proof somewhat for a dimensional variance, it did not remove the variance requirements that are universally applicable to use and dimensional variance cases. Doris Terry Revocable Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa.Cmwlth. 2005). An applicant must still present evidence as to each of the

conditions listed in the zoning ordinance and satisfy the five-part test articulated above. Id. In addition, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicant' burden of proof and the standards to meet that burden as follows:

C. Burden of proof. For variances, the burden of proof shall be on the applicant. For special exceptions, the applicant shall be entitled to the special exception unless others can prove that it would adversely affect the public health, safety, morals or welfare.

D. Standards of proof.

(2) Variance case. An applicant for a variance shall have the burden of establishing:

(a) All the requirements of § 910.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, No. 247, as amended, 53 P.S. § 10910.2;

(b) That literal enforcement of the provisions of this chapter will result in unnecessary hardship, as the term is defined by relevant statutory provisions and case law; and

(c) That the allowance of a variance will not be contrary to the public interest.

### III. **Facts Applied to the Legal Standard.**

Applicants are requesting a variance from the Lower Providence Township Zoning Ordinance (the "Ordinance") § 143-37.A(2) to permit construction of an in-law suite and garage addition to an existing single-family home with a side yard setback of fifteen feet (15') where a minimum of twenty feet (20') is required and a rear yard setback of thirty feet (30') where a minimum of sixty feet (60') is required in the R-2 Residential District. Applicants additionally request relief from § 143-170 to allow building permits to be requested after 18 months from the date of this Board's decision due to supply shortages and associated increased costs.

Applicant requests this dimensional variance due to the unique characteristics of the property. Specifically, the lot is diamond shaped, surrounded on three sides by township owned



land, and located on the bulb of a cul-de-sac. Due to this, Applicants are unable to develop the property in conformity with the Ordinance without the requested relief.

The relief requested will not change the character of the neighborhood. Applicants intend to add a detached garage with an office and in-law suite that is consistent with the character of the neighborhood. Furthermore, the adjacent neighbors have no objection to the requested relief. Denying the Application would result in an undue hardship on the Applicants. Currently, their family's needs are expanding as both Applicants are now working from home. Their children are coming into driving age and additionally have been participating in remote education. Due to these circumstances an increase in the livable space and parking area are needed for the reasonable use of the property.

Applicants did not create the hardship. Further, the requested relief is the only pragmatic solution to resolve the hardship on Applicants as there is no other practical location for the construction of the proposed structure.

Finally, the COVID-19 pandemic has caused global supply chain issues that have caused construction delays. Due to this, it is difficult for Applicant to establish a timeline for the start of construction and necessity of permits. Given this difficulty, the Board finds that an extension of time to apply for the appropriate permits is necessary under the circumstances.

Therefore, the Board finds and concludes that the Applicants' requested relief should be granted.

### **CONCLUSIONS OF LAW**

1. The Applicants have standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will impose an unnecessary hardship on the

Applicants.

3. The hardship is due to the unique physical circumstances and characteristics of the Property and not self-imposed.

4. The requested relief is necessary to enable the Applicants reasonable use of the Property.

5. If granted, the community will not be significantly changed nor will it alter the character of the neighborhood.

6. The requested relief represents the minimum that will afford relief and represents the least modification possible of the regulation at issue.

### **DECISION**

The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote is as follows:

The Application of Heather and Patrick Duffy, docket #Z-21-20 for a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) § 143-37.A(2) to permit construction of an in-law suite and garage addition to an existing single-family home with a side yard setback of fifteen feet (15’) where a minimum of twenty feet (20’) is required and a rear yard setback of thirty feet (30’) where a minimum of sixty feet (60’) is required in the R-2 Residential District. Applicants additionally request relief from § 143-170 to allow building permits to be requested after 18 months from the date of this board’s decision is GRANTED.

Dated: November 1, 2021

## **ORDER**

The foregoing Findings, Discussion and Decision are hereby approved and ordered.

### LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD



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George Ozorowski

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Joseph Pucci



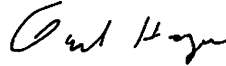
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Kathie Eskie



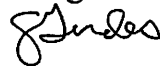
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Patricia Alzamora



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Gail Hager



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Christopher Gerdes, Alternate

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Randy Klein, Alternate

## **NOTICE TO APPLICANT**

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.